IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No.904 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL
AND
HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

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STATE OF GUJARAT - Appellant

Versus

YASINKHAN KASAMKHAN PATHAN - Respondent

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Appearance :
MR KT DAVE, APP for Appellant.
MR SR DIVETIA for Respondent.
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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 25/11/2005
ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

Instant appeal filed by the State of Gujarat under Section 378 of the Code of Criminal Procedure, 1973 (“the Code” for short) is directed against judgment dated July 27, 1999 rendered by the learned Special & Additional Sessions Judge, 2nd Court, Bharuch, in Special (N.D.P.S.) Case No.3 of 1998 by which the respondent is

acquitted of the offence punishable under Section 20(b)(i) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (“the Act” for short).

2. The facts emerging from the record of the case are as under:

On November 6, 1997, Mr.K.D.Pandya was performing duties as Police Sub Inspector, PAK Cell (ISI-ATS Cell) & Narcotic Cell, Bharuch. On that day, when he was investigating a robbery case registered with Palej Police Station, he received an information from his informer that a person wearing variegated shirt and black jeans having height of 5' 6” and aged about 28 years, was to pass through Palej Cross Roads either in a truck or a bus towards Surat and was carrying *ganja* with him. On receipt of the information, PSI Mr.Pandya made necessary entry in station diary maintained at Palej Police Station. He made necessary report as required by Section 42(2) of the Act to Divisional Police Officer, Bharuch, and District Superintendent of Police, Bharuch. He directed Head Constable Balveersinh Mohan Bava to requisition services of two panch-witnesses. Accordingly, two persons, namely, Abdulbhai Ismailbhai Kadiya and Thakorebhai Ambalal Prajapati, were called. As Mr.Kadiya and Mr.Prajapati expressed their willingness to act as

panch-witnesses, the information received by Mr.Pandya was conveyed to them. The articles necessary for sealing the substance, if found, such as seal bearing inscription of *'P.S.I. N.D.P.S. Bharuch'*, scales & weights, plastic jar for placing *muddamal*, cloth-bag, wax, candle, needle, twine, etc. were secured. Thereafter, Mr.Pandya in the company of panch-witnesses and police officials proceeded towards the place indicated in the information, in a government vehicle. Mr.Pandya and others got down from the vehicle near Palej Cross Roads and maintained a watch. At about 12.00 noon, a person having a plastic-bag in his hand, who was answering the description given in the information, was spotted coming from Nareshwar Cross Roads to Palej Cross Roads. It may be mentioned that Mr.Pandya was also accompanied by his informer and on spotting the said person, the informer informed Mr.Pandya that the person, who was coming from Nareshwar Cross Roads to Palej Cross Roads, was the person who was carrying *ganja* with him. Thereupon, the said person was intercepted. On interrogation, he disclosed his name to be Yasinkhan Kasamkhan Pathan residing near Masjid, Village Moti Koral, Taluka:Karjan, District:Vadodara (i.e. the respondent). It is relevant to notice that as Mr.Pandya had forwarded report to his immediate official superior as required by Section 42(2) of the Act, Mr.M.B.Pethani, who was then Dy.S.P., SC-ST, had also come to the spot. PSI Mr.Pandya introduced himself and

Mr.Pethani to the respondent and also conveyed the information received by him. PSI Mr.Pandya then told the respondent that it was necessary to search his person. Before effecting search, it was informed to the respondent that Mr.M.B.Pethani, who was Dy.S.P., SC-ST, was himself a gazetted officer, but he could be searched before another gazetted officer or a magistrate if so desired by him. However, the offer made by PSI Mr.Pandya was declined by the respondent. Thereupon, the plastic-bag carried by the respondent was searched, which resulted into find of *ganja.* The substance found from the possession of the respondent was, *prima facie,* ascertained to be *ganja* by smelling. Though PSI Mr.Pandya had carried with himself scales, weights, etc., it was thought that the substance found from the possession of the respondent should be weighed by an independent person and that the whole procedure of seizure should be photographed. Therefore, he asked Jamadar Sardarsinh Motisinh to requisition services of a photographer. He also asked to call a person to weigh the substance found from the possession of the respondent. Accordingly, the Police Jamadar brought Firozekhan Ahmedkhan to weigh the substance whereas photographer Pravinbhai Somabhai was summoned to photograph the procedure, which was to be undertaken by PSI Mr.Pandya. The substance found from the possession of the respondent was weighed by Firozekhan and its weight was ascertained to be 6 Kilograms. The

plastic bag in which *ganja* was kept, was bearing writing “Krubhco Urea” in Hindi and English. PSI Mr.Pandya demanded pass or permit from the respondent authorising him to possess *ganja,* but none could be produced by the respondent. A sample of 50 Grams was drawn and placed in transparent plastic jar on which a slip bearing signatures of panch-witnesses and PSI was affixed. Thereafter, the jar was closed with its lid. After the jar was so closed, a white cloth was wrapped on it, which was stitched with needle and twine. On the plastic jar so wrapped, slips bearing signatures of panch-witnesses and PSI Mr.Pandya were affixed, on which seal bearing inscription of “P.S.I. N.D.P.S. Bharuch” was applied and given Mark “A-1”. PSI Mr.Pandya lodged his complaint at Palej Police Station. PSI Mr.Pandya thereafter produced his complaint panchnama, *muddamal*, accused, etc. before the PSO of Palej Police Station, i.e. Usmanbhai Gani Husain. PSO Mr.Usmanbhai, registered the offence against the respondent punishable under the Act and kept *muddamal* in his safe custody. He handed over complaint lodged by PSI Mr.Pandya to him for further investigation. PSI Mr.Pandya recorded statements of those persons, who were found to be conversant with the facts of the case. The *muddamal* was dispatched to Forensic Science Laboratory for analysis through Police Constable Dolatbhai Chhaganbhai. The report of the analysis indicated that the substance analysed was *ganja* within

the meaning of the Act. On completion of the investigation, the respondent was chargesheeted in the Court of learned Special Judge, Bharuch, for commission of offence punishable under Section 20(b)(i) of the Act on the basis of which, Special (NDPS) Case No.3 of 1998 was registered.

3. The learned Special & Additional Sessions Judge, 2nd Court, Bharuch, framed necessary charge against the respondent at Exh.3. It was read over and explained to him. He pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined: (1) panch Firojkhan Ahmedkhan as P.W.-1 at Exh.6; (2) photographer Pravinbhai Somabhai as P.W.-2 at Exh.7; (3) panch Abdulbhai Ismailbhai as P.W.-3 at Exh.11; (4) panch Thakorebhai Ambalal Prajapati as P.W.-4 at Exh.15; (5) Unarmed Police Constable Dolatbhai Chhaganbhai as P.W.-5 at Exh.16; (6) Police Constable Jamiyatbhai Thakorebhai as P.W.-6 at Exh.22; (7) Head Constable Usmanbhai Gani Husain as P.W.-7 at Exh.24; and, (8) PSI Mr.Kaushikbhai Dinkarbhai Pandya as P.W.-8 at Exh.28, to prove its case against the respondent. The prosecution also produced documentary evidence such as; panchnama of seizure of plastic bag carried by the respondent and seizure of 6 Kilograms of *ganja* therefrom at Exh.12; letter by PSI, Bharuch, to PSI, Palej Police Station, to hand over

muddamal to Unarmed Police Constable Dolatbhai so that the same can be dispatched to F.S.L. at Exh.17; letter by PSI Bharuch to Director of F.S.L. to accept *muddamal* from Unarmed Police Constable Dolatbhai at Exh.18; letter by PSI, Bharuch, to PSI, Palej Police Station, to keep the *muddamal* in safe custody as it could not be delivered to F.S.L. by Police Constable Dolatbhai at Exh.19; another letter to PSI, Bharuch, to PSO, Palej Police Station, to hand over *muddamal* to Police Constable Dolatbhai for sending the same to F.S.L. at Exh.20; entry indicating that the *ganja* was found from the possession of the respondent and that the investigation of the case was handed over to PSI Mr.Pandya at Exh.21; forwarding letter by PSI Mr.Pandya, Narcotic & PAK Cell, to PSI, Palej Police Station, with which *muddamal,* panchnama, etc. were handed over at Exh.26; entry indicating that the information received by PSI Mr.Pandya was reduced into writing as required by Section 42(2) of the Act at Exh.29; report forwarded by PSI Mr.Pandya to his immediate official superior as required by Section 42(2) of the Act at Exh.30; consent letter signed by the respondent indicating that he willingly accepted to be searched in presence of Mr.M.B.Pethani, Dy.S.P., at the spot at Exh.31; resolution prepared by PSI Mr.Pandya before effecting search of bag carried by the respondent at Exh.32; complaint lodged by PSI Mr.Pandya at Exh.36; intimation given by PSI Mr.Pandya to Sub Divisional

Magistrate regarding seizure of *ganja* from the respondent as required by Section 58 of the Code at Exh.37; production report forwarded to the learned Chief Judicial Magistrate at Exh.38; report of the F.S.L. at Exh.40; order constituting PAK Cell at Exh.46; resolution indicating that the provisions of Section 50 of the Act were complied with and confession made by the respondent admitting his guilt, etc. in support of its case against the respondent.

4. After recording of evidence of prosecution witnesses was over, the learned Special Judge explained to the respondent the circumstances appearing against him in the evidence of prosecution witnesses and recorded his further statement as required under Section 313 of the Code. In his further statement, the respondent claimed that a false case was foisted upon him. According to the respondent, he was picked up from his house, but no offending substance was found from his possession and that after threatening him, a false case was lodged against him. However, no defence evidence was adduced by him.

5. On appreciation of evidence adduced by the prosecution, the learned Judge noticed that PSI Mr.Pandya, who had lodged the complaint, had investigated his own complaint, which was a suspicious circumstance

and was a factor against the prosecution. The learned Judge also noticed the claim made by PSI Mr.Pandya that before proceeding to the spot indicated in the information, he had carried with him scales and weights and held that, therefore, his claim that Firozekhan was summoned to weigh the substance found from the possession of the respondent, was highly doubtful. The learned Judge held that after seizure of offending substance from the respondent, PSI Mr.Pandya had failed to report the seizure to magistrate having jurisdiction over the area where the offending substance was seized as required by Section 102(3) of the Code, which was fatal to the prosecution. The learned Judge deduced that Section 55 of the Act was not strictly complied with whereas the claim of PSI Mr.Pandya that the respondent was found in possession of *ganja,* which was seized, was not corroborated by independent evidence of panch-witnesses, who had turned hostile and was, therefore, liable to be disbelieved. In view of abovereferredto conclusions, the learned Judge has acquitted the respondent by judgment dated July 27, 1999 giving rise to instant appeal.

6. Mr.K.T.Dave, learned counsel of the appellant, contended that the case of the prosecution stands fully and satisfactorily established by reliable testimony of PSI Mr.Pandya and, therefore, the learned Judge was not

justified in acquitting the respondent. According to the learned APP, PSI Mr.Pandya had complied with mandatory provisions of the Act such as Sections 42(1), 42(2) and 50, before effecting search of plastic bag carried by the respondent and seizing the offending substance from the possession of the respondent and, therefore, the respondent could not have been acquitted by the learned Special Judge. What was asserted by the learned APP for the State was that while considering that the provisions of Section 102(3) of the Code were complied with, the learned Judge has completely ignored the contents of production report produced on record of the case at Exh.38 and, therefore, the impugned judgment deserves to be set aside. The learned APP stressed that merely because panch-witnesses have chosen to turn hostile, the prosecution case should not have been doubted by the learned Special Judge when it was proved through reliable testimony of police officials that the respondent was found in possession of offending substance and, therefore, acquittal of the respondent should be set aside. It was argued that the provisions of Section 55 of the Act are not applicable to the facts of the case and, therefore, the learned Judge was not justified in recording a finding that there was partial compliance of Section 55 of the Act. According to the learned counsel of the State Government, the respondent could not probabilise his defence of alibi pleaded by him in his

further statement and, therefore, the prosecution case should have been accepted, which was satisfactorily proved by PSI Mr.Pandya. The learned APP for the State asserted that the learned Special Judge has failed to appreciate the evidence on record in its true perspective and, therefore, the appeal should be accepted.

7. It may be mentioned that instant appeal was placed for admission hearing before the Division Bench comprising M.S.Parikh & H.H.Mehta, JJ. on February 1, 2000 and after hearing the learned Additional Public Prosecutor for the State, the Division Bench passed following order:

> *"Mr.N.D.Gohil, learned APP, appears for the State. Leave granted. Appeal admitted. Bailable warrant in the sum of Rs.10,000=00 to issue. It will be open to the State to move appropriate application for imposition of any further conditions of bail, if found necessary."*

The record of the case shows that the respondent is duly served. However, he has not appeared either in person or through a lawyer. Having regard to the facts of the case, this Court found that it was necessary to appoint a Senior Advocate practising in this Court, who can render competent legal assistance to the respondent. Accordingly, Mr.S.R.Divetia, learned Senior Advocate, was appointed to render legal assistance to the respondent.

8. Mr.S.R.Divetia, learned counsel of the respondent, contended that the evidence of PSI Mr.Pandya indicates that at the time when seizure was effected, about 100 persons had collected, but the prosecution has not examined any of them and as so-called independent panch-witnesses have turned hostile, well-founded acquittal of the respondent should be confirmed by this Court. It was argued that the conduct of PSI Mr.Pandya in carrying scales and weights with him, but not using the same for the purpose of weighing the substance found from the possession of the respondent, is strange and, therefore, the learned Judge of the trial Court, who had advantage of observing demeanour of the witnesses, was justified in doubting the prosecution case that the respondent was found in possession of *ganja.* The learned counsel of the respondent pleaded that report under Section 102(3) of the Code would lend credence to the case of the prosecution that offending substance was found from the possession of the respondent and, therefore, non-forwarding of the report under said Section is rightly treated as having vitiating effect on the prosecution case. In the alternative, the learned counsel emphasised that production report produced by the prosecution at Exh.38 should not be treated as report under Section 102(3) of the Code and, therefore, the

acquittal of the respondent should not be disturbed by the Court. It was argued that cogent and convincing reasons have been assigned by the learned Special Judge for acquitting the respondent and as the learned Additional Public Prosecutor for the State has failed to dislodge those weighty reasons, the appeal, which lacks merits, should be dismissed by the Court.

9. This Court has heard Mr.K.T.Dave, learned Additional Public Prosecutor for the State, and Mr.S.R.Divetia, learned Senior Advocate of the respondent, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case as well as the entire evidence on record with reference to broad and reasonable probabilities of the case.

10. As noticed earlier, one of the grounds assigned by the learned Judge of the trial Court for doubting the prosecution is that PSI Mr.Pandya, who lodged complaint, himself investigated his complaint. So far as this point is concerned, the Court finds that PSI Mr.Pandya was appointed in Narcotic Cell and it was his duty to curb harmful activities amounting to commission of offences punishable under Act. He had received prior information, which was reduced into writing by him. He had also

forwarded his report to his immediate official superior as required by Section 42(2) of the Act. It is relevant to notice that in view of the report forwarded by him, Dy.S.P. Mr.Pethani was althroughout present during the course of search of plastic bag carried by the respondent and seizure of *ganja* from the possession of the respondent. It is also relevant to notice that PSI Mr.Pandya was also accompanied by his informer, who had given the information that the respondent was to pass *via* Palej Cross Roads with *ganja.* Under the circumstances, the investigation of the complaint, which was undertaken by PSI Mr.Pandya pursuant to direction given by the PSO of Police Station, should not have been doubted by the learned Judge of the trial Court. The investigation of the complaint by a Police Officer can be treated as having adverse effect on the prosecution case provided something is brought on record of the case to indicate that the Police Officer was bearing grudge against the accused or was out to settle personal scores with the accused. The record of this case shows that PSI Mr.Pandya was searchingly cross-examined at length by the defence. However, it is worth noticing that even remotely, it could not be suggested by the defence to the Police Officer that either he was on inimical terms with the respondent or that he was out to settle personal scores

with the respondent. Therefore, the prosecution case could not have been doubted on the ground that the complaint lodged by PSI Mr.Pandya was investigated by himself.

11. It is true that on the facts and in the circumstances of the case appearing in (1) **Bhagwan Singh vs. State of Rajsthan, (1976) 1 SCC 15,** and (2) **Megha Singh vs. State of Haryana, (1996) 11 SCC 709**, investigation by the same officer, who had lodged First Information Report, was condemned. However, in **State represented by Inspector of Police, Vigilance & Anti-Corruption, Tiruchirapalli, T.N. vs. V.Jayapaul, (2004) 5 SCC 223**, the Supreme Court has re-examined the issue and after referring to principles laid down in **State of U.P. vs. Bhagwant Kishore, A.I.R. 1964 SC 221**, it has held in paragraph 4 of the reported decision as under:

> *"There is nothing in the provisions of the Criminal Procedure Code which precluded the appellant from taking up the investigation. The fact that said police officer prepared the FIR on the basis of the information received by him and registered the suspected crime does not, in our view, disqualify him from taking up the investigation of the cognizable offence. A suo motu move on the part of the police officer to investigate a cognizable offence impelled by the information received from some sources is not outside the purview of the provisions contained in Sections 154 to 157 of the Code or any other provisions of the Code."*

Further, the Supreme Court has made following pertinent observations in paragraph 6 of the reported decision.

> *"There is no principle or binding authority to hold that the moment the competent police officer, on the basis of information received, makes out an FIR incorporating his name as the informant, he forfeits his right to investigate. If at all, such investigation could only be assailed on the ground of bias or real likelihood of bias on the part of the investigating officer. The question of bias would depend on the facts and circumstances of each case and it is not proper to lay down a broad and unqualified proposition, in the manner in which it has been done by the High Court, that whenever a police officer proceeds to investigate after registering the FIR on his own, the investigation would necessarily be unfair or biased."*

Meaningful reading of the abovequoted observations makes it very clear that whenever police officer proceeds to investigate after registering the FIR on his own, the investigation would not necessarily be unfair or biased. According to the Supreme Court, such investigation can only be assailed on the ground of bias or real likelihood of bias on the part of the Investigating Officer. The close scrutiny of the entire evidence on record makes it very clear that it was never suggested to PSI Mr.Pandya that there was bias against the respondent nor it could be established that

there was real likelihood of bias on the part of Mr.Pandya when he investigated his own complaint. In view of the principles laid down in **State (supra)**, this Court is of the opinion that the finding recorded by the trial Court that the case of the prosecution is doubtful because the complaint lodged by PSI Mr.Pandya was investigated by himself, is liable to be set aside and is, accordingly, hereby set aside.

12. Another ground of acquittal, which has heavily weighed with the learned Judge of the trial Court, is that PSI Mr.Pandya committed breach of provisions of Section 102(3) of the Code. Section 102(3) of the Code provides that any police officer who seizes any property alleged or suspected to have been stolen, or which may be found under circumstances, which create suspicion of the commission of any offence, shall report the seizure to the Magistrate having jurisdiction over the area from where the property is seized.

A bare reading of Section 102 of the Code makes it very clear that it will come into picture only if the police officer has seized the property which is alleged to have been stolen, or is found under the circumstance which creates suspicion of the commission of any offence.

In instant case, there was no question of finding the respondent with the property under the circumstances creating suspicion of the commission of any offence but, in fact, the respondent was found with contraband article namely, *ganja,* in his possession without pass or permit and was arrested in view of the provisions of the Act. Therefore, provisions of Section 102(3) of the Code would not apply to the facts of the case. Even otherwise, the record of the case shows that the seizure of offending substance was reported to the learned Judicial Magistrate, Bharuch, when the respondent was produced before him after arrest. This is evident from the contents of Exhibit 38. Exhibit 38 produced during the course of recording of testimony of PSI Mr.K.D.Pandya, reads as under:

> *"To*
> *Hon'ble the Chief Judicial Magistrate,*
> *Chief Court, Bharuch.*
>
> *Report of Mr.K.D.Pandya, PSI, PAK & Narcotics Cell, Bharuch District, is as under:*
>
> *The accused of C.R.No.II-50/97 registered with Palej Police Station for commission of offences punishable under Sections 8(c) read with Section 20(b) of the N.D.P.S.Act, 1985, aged 29 Years, residing near Masjid, Village : Moti Koral, Taluka : Karjan, District : Vadodara, was*

arrested on November 6, 1997 at 14.30 hours, and, is produced before Your Honour within the time prescribed and it is requested to take him in Your Honour's custody."

Date:07/11/1997

Sd/- (Illegible)
Police Sub Inspector
& Narcotic Cell,
Bharuch District."

Abovequoted report will have to be regarded as report under Section 102(3) of the Code. In **Raghubhai Gandabhai Bharwad vs. State of Gujarat, 2002(3) GCD 168 (UJ) (Guj.)**, the Division Bench of this Court has taken the view that there can be a common report by which the accused in N.D.P.S. case can be produced before the learned Magistrate mentioning that why he was arrested and report under Section 102(3) of the Code. Such report will have to be regarded as sufficient compliance of provisions of Section 102(3) of the Code. Therefore, this Court is of the firm opinion that the learned Judge of the trial Court was not justified in acquitting the respondent on the ground that breach of provisions of Section 102(3) of the Code committed by PSI Mr.Pandya, was fatal to the prosecution case. The said finding is against the weight of the evidence on record and is hereby set aside.

13. The plea raised by Mr.S.R.Divetia, learned counsel of the respondent, that independent witnesses

were not examined to prove that plastic bag carried by the respondent was searched and that *ganja* was found from the possession of the respondent whereas so-called panch-witnesses have turned hostile and, therefore, the prosecution case should be disbelieved, has no substance at all. It is well settled that it is the quality of the evidence and not quantity, which is important. The test is: Has the prosecution been able to bring home the charges with the evidence available on record. If evidence on record is otherwise satisfactory and trustworthy, an increase in number of witnesses is not required. The Supreme Court has time and again warned the courts in the country that it is not the quantity, but quality of the witnesses, which matters for determining the guilt or innocence of the accused. According to the Supreme Court credible evidence of a solitary witness can form basis of conviction. The prosecution case cannot be doubted merely because none of the hundred persons, who had collected at the spot when search of plastic bag carried by the respondent was made and seizure of *ganja* was effected, has not been examined. It is not necessary that in all cases, all witnesses present at the time of occurrence should be examined and that too on the same point. Mere non-examination of one of the eye-witnesses to speak on the point would not impair the prosecution

case when the police official examined in this case has fully unfolded the prosecution case. Strength of a case does not depend upon a number of witnesses examined. It is open for the prosecution not to examine all the witnesses and to make selection of witnesses. In the case on hand, if the prosecution felt that its case has been well established through testimony of PSI Mr.Pandya, it cannot be said that non-examination of some persons, renders its version vulnerable. The evidence of PSI Mr.Pandya, which is supported by the evidence of other police officers examined in the case, as well as documentary evidence on record, is found to be trustworthy. It could not be pointed by the learned counsel of the respondent that it is suffering from any major discrepancy or that it has no ring of truth whatsoever. As explained by the Supreme Court in **Ramanand Yadav vs. Prabhu Nath Jha & Ors., A.I.R. 2004 SC 1053,** any of the hundred persons, who were allegedly present at the time when plastic bag carried by the respondent was searched and *ganja* was seized, could have been examined as defence witness, but that was not done in this case. Therefore, mere non-examination of one of the hundred persons allegedly present would not render the prosecution case doubtful at all. Further, the law does not expect the prosecution to multiply the evidence.

If any one person amongst those who had collected at the spot had been examined, he would have either supported the claim of PSI Mr.Pandya or would have turned hostile. In later event, he would have been declared hostile and his testimony would not have helped any one. Therefore, non-examination of so-called independent witnesses cannot be treated as having vitiating effect on the prosecution case. The finding recorded by the learned Judge of the trial Court on this count is, therefore, set aside.

14. The plea that panch-witnesses have turned hostile and, therefore, PSI Mr.Pandya should be disbelieved, is merely stated to be rejected. This question has been examined in detail by the Division Bench of this Court in **Vahaji Ravaji Thakore & Anr. vs. State of Gujarat, 2003 (3) G.L.H. 283**. The Division Bench, after considering the decisions of the Supreme Court on the point, has held in paragraphs 33 to 35 as under:

> *"33. From record, it appears that accused No.2 and accused No.4 were arrested at 11-00 a.m. immediately on the next day i.e. on 1st October, 1993. It also appears that on the same day, accused No.1 was arrested at 11-35 a.m. and accused No.3 also was arrested in the evening at 18-15 hrs. on the very same day. Thereafter, at the instance of accused Nos.2 and accused No.4, an axe which was concealed by accused No.2 was traced out at the instance of accused No.2 himself and a stick which was concealed*

by accused No.4 was traced out at the instance of accused No.4. For these two articles viz. axe and Stick, discovery panchnama Ex.32 was drawn under Sec.27 of the Indian Evidence Act. To prove this discovery panchnama Ex.32, the prosecution examined P.W.10 Jivanji Vasaji Thakor at Ex.31 and P.W.11 Dehalaji Valji Thakor at Ex.34. In the same manner, muddamal Dharia which was concealed by Accused No.1 was discovered at the instance of accused No.1 and it was seized under discovery panchnama at Ex.33. To prove the panchnama Ex.33, the prosecution examined the same two panch witnesses at Ex.31 and Ex.34. It is true that these two panch witnesses turned hostile and did not support the case of the prosecution with regard to discovery panchnamas at Exs.32 and 33. But the fact remains that the fact with regard to discovery panchnamas at Exs.32 and 33 is proved by the Investigating Officer, P.S.I. Mr. Dalaji Arajanbhai Desai at Ex.41. In his evidence on oath, Mr.Desai has proved the requirements of Sec.27 of the Indian Evidence Act with regard to such type of discovery panchnama. It is now well settled that the discovery of fact referred to in Sec.27 is not the object recovered but the fact embraces the place from which the object is recovered and the knowledge of the accused as to it, and therefore, this is relevant piece of evidence connecting the accused with the crime. Of course, panch witnesses are turned hostile but merely because they are turned hostile, the evidence of Police Officer should not be discarded. In case of Modan Singh Vs. State of Rajasthan reported in AIR 1978 SC 1511, the Hon'ble Supreme Court has held as follows:

> *"If the evidence of investigating Officer who recovered the material objects is convincing, the evidence as to recovery need not be rejected on the ground that seizure witnesses do not support the prosecution version."*

34. Same type of view has been taken by the Supreme Court in case of Mohd. Aslam Vs. State of Maharashtra reported in (2001)9 SCC 362. It is held that "evidence of police officer effecting recovery could not stand vitiated by reason of panch witnesses supporting the evidence turning hostile".

35. In view of aforesaid legal position, we

> *are of considered view that merely because the panch witnesses do not support the case of the prosecution, the case of the prosecution need not be thrown over board as unreliable. It must be realised that the phenomenon of panch witnesses turning hostile to the prosecution is not unknown and is ever on the increase. It needs hardly to be emphasised that the decision of a case does not depend solely on the question whether the panch witnesses support the prosecution or turn their back on it. If the decision of the case were to depend solely on the testimony of panch witnesses regardless of the evidence of independent witnesses, in theory, it would be giving a right of veto to the panchas so far as the question of culpability of an accused is concerned. If the evidence of police officer is otherwise found to be true and dependable, judicial pragmatism requires that merely because the panchas do not support, it should not be made a ground to discard his evidence."*

Thus, PSI Mr.Pandya cannot be disbelieved unless it is demonstrated before the Court that his testimony is suffering from inherent improbabilities or that there are major discrepancies in his evidence or that he does not stand corroborated by the documentary evidence or he has bias against the respondent. Having regard to the straightforward and natural testimony tendered by PSI Mr.Pandya, this Court is of the opinion that search of plastic bag carried by the respondent as well as find and seizure of *ganja* therefrom, stands fully established by reliable testimony of PSI Mr.Pandya, which stands fully corroborated by evidence of other police officials examined in the case as well as documents produced on record of the case. On the facts and in the circumstances

of the case, this Court finds that the learned Judge of the trial Court was not justified at all in doubting the prosecution case regarding search of plastic bag carried by the respondent as well as find and seizure of *ganja* therefrom on the ground that panch witnesses did not support the prosecution.

15. The finding recorded by the learned Judge that provisions of Section 55 of the Act were not fully complied with, is difficult to understand. Section 55 of the Act provides that an officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and shall also be sealed with a seal of the officer-in-charge of the police station.

16. The facts of the case would indicate that after seizure of *ganja* from the possession of the respondent was effected, *muddamal* was drawn and *muddamal* was handed over to PSO Usmanbhai Gani Husein of Palej Police Station for safe custody. The record does not indicate that after *muddamal* was handed over to PSO of Palej Police Station,

another sample was taken therefrom by PSI Mr.Pandya or by anyone deputed by PSI Mr.Pandya nor PSI Mr.Pandya ever demanded to affix his seal to the articles which were handed over to PSI for safe custody. Therefore, it was not necessary for PSO to apply his seal on the *muddamal,* which was handed over to him for his safe custody. Having regard to the facts of the case, this Court is of the firm opinion that the learned Judge was not justified at all in recording a finding that the provisions of Section 55 of the Act were not fully complied with. Mr.S.R.Divetia, learned counsel of the respondent, has not argued before this Court that Section 55 of the Act was committed breach of by PSI Mr.Pandya and, therefore, finding recorded by the learned Judge of the trial Court that provisions of Section 55 of the Act were partially complied with, has no factual basis, and is hereby set aside.

17. It may be mentioned that PSI Mr.Pandya was neither a gazetted officer nor an empowered officer within the meaning of Section 41(2) of the Act and, therefore, it is necessary for this Court to ascertain whether the provisions of Section 42 of the Act are applicable to the facts and if yes whether they were complied with by PSI Mr.Pandya. The information received in this case was that the respondent was to pass through Palej Cross Roads in a bus with *ganja.* No

information was received that he had concealed or kept *ganja* in any conveyance or a building or an enclosed place. Therefore, this Court is of the opinion that the provisions of Section 42 of the Act will not be applicable to this case. In **State of Haryana vs. Jarnail Singh & Ors., (2004) 5 SCC 188,** a tanker moving on public highway was stopped and searched, from which poppy husk was recovered. After considering the scheme envisaged by Sections 42 & 43 of the Act, the Supreme Court has held that Sections 42 & 43 of the Act contemplate two different situations. According to the Supreme Court, Section 42 contemplates entry into and search of any building, conveyance or enclosed place while Section 43 contemplates a seizure made in any public place or in transit. In view of abovereferredto interpretation, the Supreme Court has held that Section 42 of the Act had no application to the facts of that case and that Section 43 of the Act was applicable. Applying the principles laid down in the above quoted decision to the facts of the case, this Court is of the opinion that provisions of Section 42 of the Act will not apply to the facts of the case. In the alternative, this Court finds that PSI Mr.Pandya had reduced the information received by him from his informer into writing and made entry in the Station Diary, which was maintained at Palej Police Station. Mr.Pandya has

supported his assertion that he had reduced the information into writing by producing copy of entry from station diary at Exh.29. PSO of Palej Police Station, i.e. Usmanbhai Gani Husein, has also stated in his substantive evidence before the Court that PSI Mr.Pandya had come to Palej Police Station and made entry in the station diary at about 10.30 A.M. on November 6, 1997. In view of reliable evidence adduced by the prosecution, there is no manner of doubt that provisions of Section 42(1) of the Act were fully complied with by PSI Mr.Pandya. The record further shows that after receipt of the information, necessary report was forwarded by PSI Mr.Pandya to his immediate official superior. The report so forwarded is produced by the prosecution at Exh.30. Further, witness Jamiyatbhai Thakore examined at Exh.22, has, in terms, stated that on November 6, 1997 PSI Mr.Pandya and his staff was investigating robbery case and at that time, a secret information regarding commission of offence punishable under the Act was received and on the basis of that information, two covers were handed over to him to be delivered to District Superintendent of Police and Divisional Police Officer. The witness has asserted that after he was handed over two covers, he had gone to the office of Divisional Police Officer and the office of the Superintendent of Police and delivered the respective covers. Thus, there is no manner of doubt that the provisions of Section

42(2) of the Act were also fully complied with by PSI Mr.Pandya. The record further shows that what was searched was plastic bag carried by the respondent and not his person. Therefore, the provisions of Section 50 of the Act would not be applicable. This is so in view of authoritative pronouncement of law on the point by the Supreme Court in **State of H.P. vs. Pawan Kumar, (2005) 4 SCC 350.**

18. Even otherwise, the record clearly establishes that before effecting search, the respondent was informed that Deputy Superintendent of Police Mr.Pethani, who was a gazetted officer, was present and though Mr.Pethani was present, search of bag could be effected in presence of a gazetted officer or a magistrate if so desired by the respondent, but the said offer was declined by him. This fact has been stated by PSI Mr.Pandya in his substantive evidence before the Court. It could not be demonstrated to be false during the course of his lengthy cross-examination. PSI Mr.Pandya stands corroborated by the contents of panchnama as well as complaint wherein the fact that offer as required by Section 50 of the Act was made and was declined by the respondent, is mentioned. Before effecting the search, PSI Mr.Pandya had prepared a resolution indicating that provisions of Section 50 of the Act were complied with. That resolution

is on running Page 107 of the paper-book. On re-appreciation of evidence, this Court is of the opinion that the provisions of Section 50 of the Act were complied with. The above discussion would show that all mandatory provisions of the Act were complied with by PSI Mr.Pandya and, therefore, the respondent is not entitled to any benefit on the ground that mandatory provisions of Section 50 of the Act were not complied with by PSI Mr.Pandya.

19. The net result of the above discussion is that uncalled for acquittal of the respondent will have to be reversed and the respondent will have to be convicted for commission of offence punishable under Section 20(b)(i) of the Act. The only view possible in the matter on the evidence on record is that commission of offence by the respondent punishable under the provisions of Section 20(b)(i) of the Act is firmly established and, therefore, the judgment impugned in the appeal will have to be set aside.

20. For the foregoing reasons, judgment dated July 27, 1999 rendered by the learned Special Judge & Additional Sessions Judge, 2nd Court, Bharuch, in Special (N.D.P.S.) Case No.3 of 1998 acquitting the respondent of the offence punishable under Section 20(b)(i) of the Act is hereby set aside. Instead, the respondent is convicted

for commission of offence punishable under Section 20(b)(i) of the Act. This Court has elaborately heard the learned counsels of the parties with regard to sentence to be imposed on the respondent for commission of offence punishable under Section 20(b)(i) of the Act. Section 20(b)(i) of the Act as was applicable to the facts of the case was as under:

> *"Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder,-*
>
> *(b) produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable,-*
>
> *(i) where such contravention relates to ganja or the cultivation of cannabis plant, with rigorous imprisonment for a term which may extend to five years and shall also be liable to fine which may extend to fifty thousand rupees."*

A bare reading of abovequoted provisions makes it very clear that sub-clause (i) of Clause (b) of Section 20 of the Act did not prescribe minimum punishment to be imposed at all and wide discretion, which must be judiciously exercised, was available to the Court.

21. The record of the case shows that the respondent was arrested on November 6, 1997 and was not granted bail during the pendency of the trial. He came to be released

from Jail only when judgment of acquittal was pronounced by the learned Special Judge on July 27, 1999. It means that as an under-trial prisoner, the respondent was in Jail for a period of one year and eight months. The provisions Act No.9 of 2001 would not applicable to the facts of instant case. However, the Court cannot be oblivious of the fact that graded punishments have been provided by the amending Act and that attempt is to reform those persons who are convicted under the Act. The Court is reversing the acquittal of the respondent roughly after about seven years. On the facts and in the circumstances of the case, this Court is of the opinion that interest of justice would be served if the respondent is sentenced to R.I. for one year and eight months and fine of Rs.5,000=00 (Rupees Five Thousand Only), in default S.I. for six months. Accordingly, for commission of offence punishable under Section 20(b)(i) of the Act, the respondent is sentenced to R.I. for one year and eight months as well as fine of Rs.5,000=00 (Rupees Five Thousand Only), in default S.I. for six months. It is made clear that the respondent has already undergone substantive sentence imposed on him by this Court during the course of trial and, therefore, it is not necessary for him to surrender to the Jail Authorities to undergo the sentence imposed on him by this Court. As far as payment of Rs.5,000=00 (Rupees Five Thousand Only) as fine is concerned, the respondent is

given time of two months to pay the same from the date of receipt of writ by the respondent, failing which he shall have to undergo S.I. for six months as directed by the Court. The appeal accordingly stands allowed. *Muddamal* be disposed of in terms of the provisions of the Act.

[J.M.PANCHAL, J.]

[H.B.ANTANI, J.]

Rajendra